Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RALPH GRAYSON,

Petitioner,

v.

JOHN W. SNOW,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE TREASURY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *McDonnell Douglas Corp. v. Green* requires a Title VII plaintiff to establish in his prima facie case that other similarly situated non-protected employees were treated more favorably and that the plaintiff was meeting his employer's expectations both before and at the time the disciplinary action was taken.

2. Whether in a Title VII case alleging that the employer's investigations of Petitioner were discriminatory and retaliatory a court may consider the results of the investigations to determine that the Petitioner has not made out a prima facie case.

3. Where Petitioner presented evidence that his employer did not discipline a supervisor and other white employees who had organized and participated in the annual racist "Good Ol' Boy Roundups," should the court have considered such evidence as direct and indirect evidence of disparate treatment?

4. Where Petitioner filed three separate charges of retaliation and only one of the charges was time-barred, may the District Court dismiss all three charges?

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PREVIOUS OPINIONS

The citations of the official reporters of the opinions and orders entered in this case, in reverse chronological order, are as follows:

> The United States Court of Appeals for the Seventh Circuit affirmed the decision of the United States District Court for the Northern District of Illinois. *Grayson v. O'Neill*, 308 F.3d 808 (7th Cir. 2002).
>
> The United States District Court for the Northern District of Illinois granted summary judgment in favor of Respondent Paul O'Neill, then Secretary of the United States Department of the Treasury, on Petitioner's discrimination claim. *Grayson v. O'Neil (sic)*, 150 F. Supp. 2d 979 (N.D. Ill. 2001).

STATEMENT OF JURISDICTION

The jurisdiction of the District Court for the Northern District of Illinois was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000 *et seq.*, and under 28 U.S.C. §§ 1331 and 1343(a)(4). On October 25, 2002, a panel of the United States Circuit Court of Appeals for the Seventh Circuit affirmed the decisions of the District Court granting summary judgment in favor of Respondent Paul O'Neill. On December 20, 2002, the Seventh Circuit denied Grayson's Petition for Rehearing En Banc. Petitioner, acting pro se, initially sought a timely writ of certiorari on March 20, 2002. On April 17, 2003, the Clerk of this Court determined that the form of the Petition did not comply with certain rules of this Court and

returned the Petition with a letter indicating the deficiencies and allowed Petitioner to refile within 60 days. Pursuant to U.S. S.Ct. Rule 14.5., Petitioner now submits this corrected Petition for a Writ of Certiorari. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he

has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter[.]

Petitioner respectfully urges this Court to grant the petition for certiorari for the reasons stated below.

STATEMENT OF FACTS

In 1974, Petitioner Ralph Grayson ("Grayson" or "Petitioner"), an African American male, was hired by the Secret Service, a bureau of the United States Department of the Treasury. R. 64, ¶4. After twenty years of excellent performance, in 1993 Grayson achieved a milestone in his career when he became Special Agent in Charge ("SAIC") of the Chicago Field Office ("CFO"), the fifth largest field office in the Service. R. 64, ¶11. Grayson was the first and only African American ever appointed as a supervisor or SAIC of the CFO and was one of only a handful of African American SAICs in the entire history of the Service. *Id.*

As SAIC of the CFO, Grayson was responsible for all law enforcement, protective, and administrative activities within the Chicago District. Grayson's performance reviews reflected the achievements of the CFO. R. 64, ¶12. During his first three years as SAIC of the CFO, Grayson received outstanding performance evaluations and a Senior Executive Service bonus award. R. 64, ¶15-16. In December 1996, in recognition of Grayson's superlative performance as SAIC of the CFO, the Director of the Secret Service Eljay Bowron ("Bowron") recommended Grayson for a Meritorious Presidential Rank Award in

February 1997. R. 64, ¶19. This rare honor, which includes a $10,000 cash bonus, is given to only two individuals in the Service each fiscal year. *Id.*

In January 1997, one of two Assistant Special Agents in Charge ("ASAIC") of the CFO retired. R. 64, ¶24. Of the 15 candidates on the list to fill the position, Isaiah Mapp, an African American, had the top promotion score. R. 64, ¶25. According to the Service's protocol, the SAIC's choice of an ASAIC is invariably honored. R. 64, ¶27, 29. Grayson submitted his nominations of Mapp and two alternates for the position. R. 64, ¶28. But in early March, Grayson learned that Deputy Director Richard Griffin ("Griffin") had rejected Grayson's selection of Mapp and preferred a white male candidate. R. 64, ¶32. Griffin was Chairman of the Service's Promotion Board. Grayson insisted that Mapp was his choice; nonetheless, on March 5, a white male not nominated by Grayson was appointed to the position. R. 64, ¶¶33-35. Despite Griffin's supposed opinion that Mapp was not ready to change locations to be promoted to ASAIC of the CFO, Mapp was appointed to SAIC of the New Orleans Field Office a few months later and only after Grayson had complained that Mapp was rejected because of Mapp's race. R. 64, ¶37.

Meanwhile, on February 5, 1997, Karen Whalen ("Whalen"), an agent in the CFO, had filed a written grievance against Grayson alleging "[i]nappropriate and inaccurate criticism in the presence of a non-supervisory employee." R. 64, ¶38. Grayson's immediate supervisor, Deputy Assistant Director for Investigation, Bruce Bowen ("Bowen") was advised of her grievance. R. 64, ¶39. After a telephone conversation with Grayson about the grievance, Bowen determined that no relief should be granted to Whalen. *Id.* In early March, Whalen amended her

grievance claiming that Grayson had retaliated against her regarding the original grievance by assigning her to a task force that prosecuted high profile gang drug cases. R. 64, ¶40.

On March 17, Norbert Vint ("Vint"), the Executive Assistant to the Director for Workforce Diversity and Workforce Planning, and Karen Barry, SAIC of the Louisville, Kentucky Field Office ("Barry") were appointed by Assistant Director Ralph Basham ("Basham"), as fact finders for Whalen's grievance. R. 64, ¶42. That same day, Vint called Grayson and informed him that he intended to hold a "full office staff meeting" with the "entire field office" in order to initiate the fact finding. R. 64, ¶47. Grayson objected to this highly unusual and unprecedented request. R. 64, ¶48. Nonetheless, Griffin, who was Vint's immediate supervisor, overruled Grayson's objections and decided that the open office meeting would take place. R. 64, ¶49.

On March 24, Vint and Barry came to Chicago to begin the fact finding on Whalen's grievance. R. 64, ¶56. During the office meeting, Vint encouraged the CFO staff to call him on any issues they wished to talk about, specifically any complaints they had about the office. *Id.* Vint also created more than 100 flyers that contained telephone and pager numbers where Vint and Barry could be reached at any time in Chicago (even though Barry had no responsibilities pertaining to diversity or workplace issues), stuffed the flyers into the staff's mail slots, and plastered the main lobby of the CFO with them. *Id.* Vint's open office meeting violated agency procedures, and was also designed to solicit complaints about Grayson from disgruntled employees. *Id.*

Almost from the outset, although ostensibly there to investigate Whalen's grievance, Vint and Barry began soliciting and accepting information from Secret Service employees that had absolutely nothing to do with Whalen's grievance. R. 64, ¶59. In the process they violated Secret Service regulations which require that EEOC charges be investigated through the grievance process. R. 64, ¶¶60-62. Vint and Barry's notes reflect a variety of claims and allegations about Grayson that had absolutely nothing to do with Whalen's grievance. R. 64, ¶¶64-65. Vint reported the "progress" of the fact finding directly to Griffin not to Basham who had appointed them as fact finders. R. 64, ¶66.

On March 31, 1997, Grayson wrote to Bowron stating that he believed that the methods employed by Vint had never been used against a white SAIC and were racially motivated. R. 64, ¶70. His letter also stated his belief that Griffin's decisions regarding conducting an open office investigation were racially motivated. *Id.* Grayson requested that Bowron intervene on his behalf. *Id.*

After Vint and Barry had completed their fact finding, they concluded that there was insufficient evidence to support Whalen's claim of retaliation. R. 64, ¶73. On April 2, 1997, Grayson filed a charge with the EEO Office in Washington D.C. by telephone, alleging that the fact finding and open office meeting were racially motivated and was done in retaliation for his seeking to promote Mapp as ASAIC of the Chicago Field Office. R. 64, ¶82. Two days later, on April 4, 1997, four agents from the Inspection Division of the Secret Service came to Chicago to conduct a two month "management review." R. 64, ¶91. The agents began interviewing CFO employees, asking them about office morale and whether Grayson had

violated agency rules regarding hotel stays, rides with dignitaries and a myriad of other issues. R. 64, ¶92.

The scope of the management review was extensive. Over 100 employees in the CFO were interviewed by the agents, and the inspection continued for more than two months. R. 64, ¶92. The investigation covered every field office coast to coast where Grayson had ever been stationed. Additionally, the agents went back as far as 1982 to investigate Grayson's relationships with women and his treatment of employees in other offices. *Id.* As a result of this extensive and unprecedented investigation, numerous complaints against Grayson were reported. R. 64, ¶96. During the inspection, the agents on occasion threatened employees who supported Grayson. R. 64, ¶¶93-94. Chicago ASAIC Tim Flick ("Flick") was repeatedly threatened or admonished to change his testimony by several of the agents. *Id.*

On July 18, 1997, in Washington D.C., Grayson received his annual performance review. R. 64, ¶99. He received "outstanding" ratings in elements 1: Directing Division Programs; 4: Safeguarding against Waste, Fraud and Loss; and 5: Safety Program; "unsatisfactory" ratings in elements 2: Internal and External Communication and 3: Personal Utilization and Development; and a "minimally satisfactory" rating in element number 6: Affirmative Action EEO support. For the first time in his career, he was given an overall rating of unsatisfactory. *Id.* Grayson refused to sign the review and wrote on the signature line: "I strongly disagree with the evaluation." Later, Grayson also provided a detailed refutation of every charge made against him. *Id.*

Grayson was then placed on administrative leave and ordered to report to a detail in the Office of Training in Washington, D.C. on August 4, 1997. R. 64, ¶141. He was field-stripped, ordered to surrender his office keys and his government car keys immediately, and prohibited from returning to or contacting anyone in the CFO. *Id.* For the first month of his new assignment, Grayson was forbidden to return home to visit his family on weekends, was forced to live in a hotel, and was not able to receive telephone messages. R. 64, ¶142.

On August 29, 1997, Grayson filed a second charge of discrimination against the Service, alleging that his negative performance evaluation, removal as SAIC of the Chicago Office, detail to Washington, D.C., and the changes in his work assignments, were racially motivated and in retaliation for his prior involvement in the EEO process. R. 64, ¶168.

On December 31, 1997, Grayson was notified that effective May 1998, he would be demoted to the Washington D.C. office as Deputy Special Agent In Charge. R. 64, ¶151. His supervisor, a white male SAIC of that office, had far less experience than Grayson in supervisory positions and he was not a member of the Senior Executive Service like Grayson. *Id.*

Within weeks of his arrival to Washington, D.C., Grayson began receiving threats from officials in the Service. R. 64, ¶152-53. On January 9, 1998, Grayson filed a third charge of discrimination against the Service alleging that his transfer to the Washington D.C. Field Office and demotion were racially motivated and in retaliation for his prior involvement in the EEO process. R.

64, ¶¶171-72. On several occasions, his immediate supervisor approached and told him that he should withdraw his Complaints against the Service because the Service was in the process of preparing administrative charges to terminate his employment. R. 64, ¶¶153, 155.

As a result of the unprecedented and discriminatory investigations, his removal from the CFO, the loss of his good reputation among his peers, and the indignity of being field-stripped and demoted to the Washington, D.C. Office with no real responsibilities and no staff, Grayson felt he could no longer tolerate the terms of his employment and felt forced to retire. He applied for retirement from the Service effective on April 25, 1998. R. 64, ¶156.

Even after Grayson established his retirement date, he still received threats of termination from his supervisor. R. 64, ¶157. As a result of these threats, Grayson moved up his official retirement date to March 28, 1998, which greatly reduced his retirement benefits. R. 64, ¶¶157-58.

After discovery closed, Grayson discovered a class action lawsuit filed by African American Service agents charging that the Service had engaged in a pattern of discriminatory practice. *See Moore v. Summers*, 113 F. Supp. 2d 5 (D.D.C. 2000). One of the lawsuit allegations involved the "Good Ol' Boy Roundups," an annual racist event conceived and organized exclusively by white male law enforcement officers from 1980 to 1995. R. 47, Exhibit C; R. 64 ¶¶190-194; R. 78; PX 114-116; R. 94. White male Service agents, particularly from the Deep South, attended and even organized the Roundups, at which the following outrageous racist behavior took place:

- There were signs saying: "no niggers allowed," and "nigger deposit point." There was

a simulated lynching – an effigy of a black person hung from a tree.

- There was a "nigger check point" at which, ostensibly, cars were checked to determine whether blacks were trying to attend the Roundup
- There were racist cassette tapes played at the roundup, with 'comedy' routines such as "the Flight of NAACP 109" and songs such as "My Wife Ran Off with a Nigger." The Flight of NAACP 109 was described as a rendition of Martin Luther King's airplane crashing.
- In 1990, the "Redneck of the Year" contest was dominated by a skit in which a police officer who donned Klan gear, led around a "slave" an individual in blackface, by a dog collar, and simulated forced oral copulation.
- There were signs that read "nigger registration" at the registration desk, and T-shirts showing blacks bent over on the hood of a police car, with the caption "Boyz on the Hood."
- In 1992, the second year that a Secret Service agent reigned as President of the Roundup, the Redneck of the Year contest included a skit in which a police officer broke open a watermelon, pulled out a black doll, and beat the doll saying, "you have to kill the seed when it's young."

R. 64 ¶190-194; R. 94, p. 4-5, 171.

Discovery of these racist activities surfaced when a videotape was obtained by a Washington, D.C. television station of one of the Roundups in 1995. R. 47 p. 7; R. 64 ¶194. The public airing of this tape unleashed a firestorm,

with Congress holding hearings on the Roundup and questioning then ATF Director, John McGaw, and then Secretary Robert Rubin, about ATF's and other law enforcement agencies' participation in the Roundup. R. 47, Exhibit C; R. 64, ¶¶194-195; R. 78; PX 114-116. The primary focus of the hearings centered on ATF's role in the Roundups. Nonetheless, Rubin admitted to Congress that ten current Secret Service agents had attended at least one Roundup. No disciplinary action was ever taken against those agents. R. 64, ¶194. The Director and Deputy Director during this shameful era in 1995 were Bowron and Griffin, who ultimately authorized the investigation and charges leading to Grayson's eventual removal from the Service. R. 64, ¶¶195-196. Despite the participation in these blatantly racist events by Secret Service agents, no supervisor was ever disciplined or demoted. R. 47; R. 64 ¶194.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Requirement That Petitioner's "Similarly Situated" Evidence Be Considered As Part Of His Prima Facie Case Rather Than As Pretext Evidence Conflicts With Previous Decisions Of This Court.

In this case, as it has in others, the Seventh Circuit has routinely required that a plaintiff present evidence that "similarly situated employees were treated more favorably" as the fourth element of a plaintiff's prima facie case. *Grayson v. O'Neill*, 308 F.3d 808, 818 (7th Cir. 2002), citing *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1012 (7th Cir. 2000). In transforming what was originally conceived as an optional form of pretext evidence into a

requirement of a prima facie case, the Seventh Circuit has raised this hurdle higher for plaintiffs in employment discrimination actions than this Court's own opinion.

The purpose of the prima facie case of discrimination, created by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), was to facilitate the plaintiff's proof of a case of discrimination. In *McDonnell Douglas, St. Mary's Honor Center v. Hicks,*, 509 U.S. 502, 506 (1993) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), this Court did not require the plaintiff to show, as part of his prima facie case, that "similarly situated" employees had been treated more favorably. *Id.* Rather, this Court envisioned that a plaintiff might, at his option, use such a showing as evidence that his employer's reason for taking adverse action against him was pretextual. *McDonnell Douglas* at 804. Accordingly, at least one other Circuit has held that "the time to consider comparative evidence in a disparate treatment case is at the third step of the burden-shifting ritual" – as pretext evidence. *Conward v. Cambridge School Committee*, 171 F.3d 12, 19 (1st Cir. 1999). Yet another Circuit Court has held that "showing that similarly situated non-protected employees were treated more favorably than the plaintiff is not a requirement but rather an alternative to satisfying the fourth element of the prima facie case – a plaintiff may satisfy the fourth element by showing *either* that the plaintiff was replaced by a person outside of the protected class *or* that similarly situated non-protected employees were treated more favorably than the plaintiff." *Talley v. Bravo Pittino Restaurant, Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995) and *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002). In this case, Grayson presented evidence that a white

male replaced him as SAIC of the CFO. R.64, ¶¶142-44, 164 fn.8

In *McDonnell Douglas*, 411 U.S. at 805, *St. Mary's*, 509 U.S. at 517, and *Reeves*, 530 U.S. at 143, this Court held that once an employee made out a prima facie case and the employer provided a non-discriminatory reason for its adverse action, then the employee must be given a full and fair opportunity to demonstrate discrimination through pretext or other evidence. More favorable treatment for non-protected employees is merely one method of proving discrimination. The employee may introduce evidence that the employer's explanation was false and, coupled with the evidence that established his prima facie case, the trier of fact could conclude that the employer unlawfully discriminated. *Reeves*, 530 U.S. at 148.

But the Seventh Circuit did not just impose a prima facie element not sanctioned by this Court; it also imposed more stringent requirements for determining whether two or more employees are "similarly situated," which conflict with other Circuit's less rigorous tests for the same element. For example, *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 940 (7th Cir. 2002), rejected plaintiff's prima facie case on the grounds that she was unable to point to any non-African American employee that was also found guilty of theft after an investigation yet was allowed to remain on the job. This sets the Seventh Circuit apart from several Circuits that have analyzed the "comparable seriousness" standard and explicitly rejected the argument that two employees must engage in the exact same offense in order to be similarly situated. *See Graham v. Long Is. R. R.*, 230 F.3d 34, 42 (2nd Cir. 2000); *Lynn v. Deaconess Med. Ctr.-West Campus*, 160 F.3d 484, 488 (8th Cir. 1988);

McAlester v. United Air Lines, Inc., 851 F.2d 1249, 1261 (10th Cir. 1988).

Here, the Seventh Circuit refused to proceed past the prima facie case based on its conclusion that Petitioner had failed to point to white SAICs who were accused of identical conduct yet were treated more favorably. *Grayson*, 308 F.3d at 818-19. This Court should grant certiorari to resolve the conflict among the Circuits regarding both (a) whether plaintiffs must prove "similarly situated" evidence to meet the fourth element of a prima facie case and (b) whether to be "similarly situated" the protected employee must have committed the same offense as a non-protected employee who was not subjected to the same adverse employment action as the plaintiff suffered. Petitioner here satisfied the fourth element by offering proof that he was replaced by a white SAIC in the CFO. R. 64 ¶¶142-44, 164 fn.8. Even if "similarly situated" evidence is required at the prima facie case stage, Petitioner met the lower "comparable seriousness" *McDonnell Douglas* standard as applied in other Circuits but rejected by the Seventh Circuit.[1]

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[1] Had the Seventh Court proceeded beyond the prima facie case, the Court would have been required to examine Grayson's other evidence that the Service's justification for the actions it took against him were pretextual and false. Grayson presented evidence of inconsistent standards, mendacity about the reasons for the open-office meeting, and a detailed, point-by-point refutation of the issues raised by the Service in the management review and the Service's use of stale, 15 year old claims to bolster its case. The Seventh Circuit also would have been required to consider the discriminatory nature of the prior investigations. *See Graham v. Long Is. R.R.*, 230 F.3d 34, 43 (2nd Cir. 2000) and *Gordon v. United States Airlines*, 246 F.3d 878, 892 (7th Cir. 2001).

II. The Seventh Circuit Improperly Considered The Results Of The Alleged Discriminatory And Retaliatory Investigations To Determine That Grayson Had Not Made Out A Prima Facie Case.

The Seventh Circuit determined that Grayson had failed to make out a prima facie case based on "evidence" that had been presented only by the Service. Specifically, the Seventh Circuit, after carefully considering the Service's allegations that it had investigated Grayson and turned up complaints against him, concluded that 1) Grayson failed to establish that he was meeting his employer's legitimate expectations "given the magnitude and the severity of the complaints," *Grayson,* 308 F.3d at 818 and 2) that Grayson was not "similarly situated" to other white male supervisors who had also been accused of misconduct. *Id.* at 819.

In determining that Grayson could not prove that he was meeting his employer's legitimate expectations, the Seventh Circuit glossed over Grayson's evidence that he was given outstanding evaluations and decorations just a few short months before he was investigated, demoted, and dishonored. This reliance on the Service's evidence conflicts with decisions of this Court and other circuit courts, which have held that only the plaintiff's – not the defendant's – evidence should be considered in deciding whether the plaintiff has made out a prima facie case. *See, e.g. Graham v. Long Is. R. R.,* 230 F.3d 34, 42 (2nd Cir. 2000). This is because "the burden to produce evidence does not shift to a defendant in a discrimination claim until a prima facie case has been established." *Id., citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). In evaluating an employee's prima facie case, other courts have looked at the employee's performance *before* the

alleged misdeeds took place. *See, e.g. Raad v. Fairbanks North Star Borough School District,* 323 F.3d 1185, 1194 (9th Cir. 2003) (plaintiff made out prima face case of discrimination by presenting evidence that she was performing her job adequately before alleged bomb threat was attributed to her.)

The Seventh Circuit also used the results of the tainted investigation to torpedo Grayson's claim that similarly situated white supervisors were treated more favorably. As this Court observed in *McDonnell Douglas Corp. v. Green*, 411 U.S. at 804 (1973), evidence that employees involved in acts of "comparable seriousness . . . were nevertheless retained" is a critical weapon in the arsenal of a race discrimination plaintiff attempting to prove pretext. Grayson does not concede that proof of dissimilar treatment of similarly situated, non-protected employees is a legitimate part of his prima facie case, but even if it were, the Seventh Circuit should not be able to use the fruits of a poisonous tree as a basis to knock out his "similarly situated" evidence.

In this case, the Seventh Circuit rejected out of hand Grayson's evidence of similarly situated white SAICs who were accused of comparable misdeeds but were not investigated or disciplined in the same way that Grayson was. The Seventh Circuit failed to consider that Grayson and the other white SAICs reported to the same supervisor, or the fact that they were all subject to the same standards, or that Grayson initially had only one complaint against him (the retaliation complaint of Karen Whalen), while

the similarly situated white SAICs had several.[2] Furthermore, it rejected Grayson's evidence that when subordinates complained about white SAICs, their complaints either were not taken seriously or were swept under the rug. Instead, the Seventh Circuit compared apples to oranges: the number of complaints against Grayson **after** the far-flung, two-month management investigation to the number of **initial** complaints against the white SAICs. This *post hoc, ergo propter hoc* consideration of the Service's post-investigation findings against Grayson was improper.

Grayson presented particularly compelling evidence that a white SAIC #3 was similarly situated to him, yet was not disciplined. The initial complaints alleged against SAIC #3 were wide-ranging and various, including that SAIC #3 had pointed a weapon at an employee, committed an act of indecent exposure, and abused his children. R. 64, ¶181. In informally investigating these initial complaints, Bowron determined that the low morale of SAIC #3's subordinates was a major problem, and that SAIC #3 had other serious management problems, including his communications with his employees. R. 64, ¶¶181-182. Had the Seventh Circuit compared the substance of the **initial** complaints against Grayson with the substance of

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[2] The District Court reasoned that "the discrimination laws should not be interpreted to discourage employers from conducting proper and desirable inquiries." 150 F. Supp. 2d at 986. Grayson's argument is that the employer's discretion to investigate its employees must not be exercised discriminatorily. Thus, the Secret Service should not be permitted to fully and extensively investigate its African American supervisors but informally investigate its white supervisors for similar misbehavior.

the initial complaints against SAIC #3, it would have been compelled to conclude that the two were at least "similarly situated" if not that SAIC #3 had more severe initial charges. In addition, the jury, not the court, should decide whether two employees are similarly situated. *Graham, supra* at 39.

III. The District Court And The Seventh Circuit Refused To Consider Evidence That The Service Did Not Discipline White Supervisors Who Organized And Participated In The Good Ol' Boy Roundups.

In addition to presenting evidence about similarly situated white SAICs who were treated more favorably, Grayson produced evidence that a fellow Secret Service manager, Buster Williams, actively planned and participated as president in the outrageous racist events of the annual Good Ol' Boy Roundups, but was neither subjected to a full Secret Service management investigation nor disciplined. The FBI conducted its own internal investigation, but there is no evidence in the Record that the Secret Service conducted one. The Seventh Circuit was utterly dismissive of this evidence – which it wrongly characterized as "speculation" – stating that it was only a theory by Grayson that an "unnamed Assistant SAIC" "may have at some time participated in the Roundups." *Grayson*, 308 F.3d at 819. The Seventh Circuit's characterization of the evidence was completely inconsistent with the actual record in this case, which contained the declaration of Janell Walker-Clark, an African American Special agent in the Atlanta Field Office ("AFO"), who averred that her superior, Buster Williams, a white male ASAIC ("Williams"), not only "took part in organizing and promoting"

the Good Ol' Boy Roundups between 1994 and 1996, but also repeatedly taunted Walker-Clark and other African American agents by telling them that they should attend the Roundups. Walker-Clark's declaration was bolstered by the affidavit of an African American Secret Service agent, Cheryl Tyler, who stated that she was assigned to the AFO from 1984-89, and during that period that Secret Service agents from that office repeatedly attended and distributed flyers around the office advertising the Good Ol' Boy Roundups. R. 94.

The Seventh Circuit further ruled that "the record demonstrates that participation by Service agents in the Roundups was thoroughly investigated by the Department of Justice and Congress" and that "Grayson presented not a shred of evidence to suggest that Director Bowron left any ASAIC who allegedly participated in the Roundups undisciplined." *Grayson*, 308 F.3d at 819. Again, these rulings are contradicted by the declaration of Walker-Clark that: 1) the Treasury Department interviewed none of the African American agents from the AFO during its investigation of the Good Ol' Boy Roundups; R. 47, Exhibit C; R. 78; R. 94; 2) the Service did not punish Williams in any way for his participation in the Roundups; *Id.* and R. 98, Exhibit 1; and 3) Williams was still ASAIC of the AFO in July 1996, when Walker-Clark felt compelled to resign from the Secret Service because of the discriminatory treatment she experienced at his hands. R. 64, ¶194; R 78; R. 94. They also conflict with the District Court's findings that Secret Service officials who were not disciplined at all in connection with Good Ol' Boy Roundups. 150 F. Supp. 2d at 984. Finally, no disciplinary action was ever taken against the other ten Service agents who participated in the Roundups. R. 64 ¶194; R. 78, ¶94.

Williams was certainly similarly situated to Grayson. He was a Secret Service manager accused of unbecoming conduct based on his active role in organizing and serving as president of the racist Roundups, and his racial taunting of agent Walker-Clark and other African American agents. Yet unlike Grayson, Williams was not demoted; he was not transferred away from his home office and family to a remote office; and he was not threatened with removal from the Secret Service. At the very least, Williams' involvement in the Roundups certainly justified an investigation that included interviews of his current African American subordinates, yet the Service never conducted any such interviews. Grayson's evidence that the Service swept Williams' egregious conduct under the rug demonstrated that the Service's proffered reasons for its adverse actions against Grayson were a "pretext[s] for racial discrimination." *Curry v. Menard*, 270 F.3d 473, 478 (7th Cir. 2001).

Even if it had acknowledged that Grayson had indeed presented evidence that Secret Service agents participated in the Good Ol' Boy Roundups, yet were neither investigated nor disciplined, the Seventh Circuit would not have considered such evidence. Tellingly, the Seventh Circuit stated, "while evidence that Service personnel participated in the Roundups certainly could be characterized as an unsightly blemish upon the Service's reputation, it is not germane to the question of whether the Service launched a discriminatorily motivated investigation into Grayson's management of the Chicago Field Office." 308 F.3d at 816. But Grayson's ability to use the Roundup evidence should not have been limited in this fashion. As the District Court conceded, if Grayson presented evidence that Bowron

"condoned or failed to punish subordinates for participating in intolerable racist misconduct at the Roundups . . . that might provide sufficient basis for denial of summary judgment," since such evidence could either be analyzed as either "direct evidence of discrimination" or "indirect evidence of dissimilar treatment of similarly situated individuals." 150 F. Supp. 2d at 986. Both the District Court and the Seventh Circuit should have considered the Roundup evidence in this light.

IV. The Seventh Circuit Improperly Upheld the District Court's Erroneous Dismissal of all Three of Grayson's Retaliation Charges where Only One of the Charges was Time-Barred.

Throughout this litigation, Grayson has always made clear that his retaliation claim was based on three separate charges of discrimination. The first was an informal EEO charge of April 2, 1997 – **which, according to the EEO regulations of the U.S. Treasury Department, was formalized in an EEO complaint on June 3, 1997**. R. 8, Exhibit 1. Of course, neither the informal April 1997 charge nor the formal June 1997 complaint alleged that Grayson was retaliated against for participating in the EEO process. Nor could they – Grayson's first use of the EEO process was when he filed the April 1997 charge. But Grayson did file two subsequent EEO charges on December 3, 1997 and March 31, 1998 alleging that the Service had retaliated against him for filing the first charge and complaint in April/June 1997. Consistent with these charges, Grayson filed a federal complaint, alleging among other things that the Service retaliated against him after he opposed "unlawful discrimination against

Mapp and file[d] a charge with the EEOC on April 2, 1997." 308 F.3d at 817. The Service filed a motion for partial summary judgment, asking the District Court to dismiss Grayson's **June 1997** discrimination charge only as time-barred. On August 6, 1999, the District Court ruled: "plaintiff's claims as to matters encompassed in the June 1997 EEO complaint are dismissed. These claims include the allegation that the Secret Service investigated plaintiff in retaliation for his complaints of discrimination." R. 21. Neither the December 1997 nor the March 1998 charge was based on retaliation against Grayson for supporting Mapp, so neither charge could have been thrown out with the April 1997 charge/June 1997 complaint. But, on August 1, 2001 the District Court inexplicably stated, "I dismissed the retaliation claim as time barred in a minute order of August 6, 1999." 150 F. Supp. 2d at 980.

The District Court's August 1, 2001 ruling was patently incorrect. The District Court failed to recognize that: (1) Grayson filed three EEO complaints, all alleging retaliation; (2) the Service only moved for partial summary judgment as to the first EEOC charge; and (3) the August 6, 1999 ruling only pertained to matters raised in the June 1997 EEO complaint. R. 7, 8, 12, 21. Alternatively, the District Court erroneously reasoned that if the claims contained in the June 3, 1997 charge were time-barred, so were all of Grayson's subsequent claims for retaliation that were in any way based on the filing of the first EEOC charge. The law clearly provides that Grayson could bring an action for the retaliation he suffered for filing the ultimately time-barred April 1997 charge/June 1997 complaint. *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1996) ("an actual violation of Title VII by the employer is not a prerequisite

for a retaliation claim.") *Filipovic v. K & R Exp. Systems, Inc.*, 176 F.3d 390, 396 (7th Cir. 1999) ("a plaintiff engages in protected activity by filing charges with the EEOC, even if the conduct he complained of did not actually violate Title VII.") The fact that an EEOC charge is itself time-barred does not render all retaliation claims springing from the charge time-barred as well. Therefore, Grayson's second and third EEOC charges properly alleged retaliation claims based on his first EEO charge, even though the Court ruled that first EEO charge is not actionable itself.

The Seventh Circuit erroneously ruled that Grayson had waived all of his claims that he was retaliated against for participating in the EEO process because he "argue[d] for the first time on appeal that the Service retaliated against him . . . because he filed a discrimination claim with the EEOC on June 3, 1997." 308 F.3d at 817. This is obviously a misapprehension of the facts because Grayson's June 3, 1997 claim is the formal version of the April 2, 1997 EEOC claim. R. 8, Exhibit 1.

The Seventh Circuit's dismissal of Grayson's retaliation claim violated the principle that "courts must follow the norm that a complaint is sufficient if any state of the world consistent with the complaint *could* support relief." *South Austin Coalition Community Council v. SBC Communications Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001) (emphasis in original). Grayson's complaint surpassed the requirement for a "short and plain statement" of his claims. Fed. R. Civ. P. 8(a). Grayson's complaint was only required to give the defendant notice of the allegation. "It is not necessary that facts or the theory of relief be elaborated." *Id. See also Speedy v. Rexnord Corp.*, 243 F.3d 397, 405 (7th Cir. 2001). The Seventh Circuit's interpretation of Grayson's retaliation claim was narrow, overly technical,

and wrong. It violated the mandate in Fed. R. Civ. P. 8(f) that pleadings be construed to do substantial justice, and ignored the fact that Grayson preserved his retaliation claim by pleading that the Service retaliated against him after he filed the April 1997 charge.

The "waiver" ruling was *sua sponte*; the Service never even attempted to argue that the retaliation claims springing from Grayson's June 1997 complaint had not been preserved in Grayson's complaint because it knew there was no difference between the April 1997 charge and the June 1997 complaint. As a result of this *sua sponte* determination, which was inconsistent with the complaint in this case, the Seventh Circuit's opinion so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.[3]

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[3] Other irregularities in the Seventh Circuit's proceedings included the court's inflammatory and unsubstantiated accusations that Grayson had "solicited bribes," *Grayson*, 308 F.2d at 813, and its reliance on twenty year old allegations that had previously been dismissed by the Service to brand Grayson as a "sexual harasser." *Id.*

CONCLUSION

For each of these reasons, Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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308 F.3d 808

United States Court of Appeals,
Seventh Circuit.

Ralph L. GRAYSON, Plaintiff-Appellant,
v.
Paul O'NEILL, Secretary, United States Department of the Treasury, Defendant-Appellee.

No. 01-3160.

Argued April 3, 2002.
Decided Oct. 25, 2002.
Rehearing and Rehearing En Banc Denied Dec. 20, 2002.

Camille B. Conway (argued), Pugh, Jones & Johnson, Chicago, IL, for Plaintiff-Appellant.

Kurt Lindland (argued), Office of U.S. Atty., Crim. Div., Chicago, IL, Edward S. Knight, Dept. of Treasury, Office of Secretary, Washington, DC, for Defendant-Appellee.

Before COFFEY, DIANE P. WOOD, and WILLIAMS, Circuit Judges.

COFFEY, Circuit Judge.

The United States Secret Service (referred to hereinafter as "Service") received in excess of 100 complaints (primarily concerning discrimination, solicitation of favors, and favoritism) about the Special Agent in Charge of the Chicago Field Office, Ralph Grayson. After it had received the complaints, the Service decided to conduct a management review of his office. The investigation revealed that Grayson not only intimidated and harassed his own employees, but also solicited favors from the public that he

was charged to protect. After the investigation, the Department asked for Grayson's resignation. After resigning, Grayson sued the Service, alleging that the Service initiated its investigation into his wrongdoing because of his race. The trial court granted summary judgment in favor of the Service and we affirm.

I. Factual Background

Ralph Grayson (African American) joined the United States Secret Service in 1974. From 1974 until 1993, Grayson was promoted through the ranks of the Secret Service, reaching the position of Special Agent in Charge (SAIC) of the Chicago Field Office. Grayson was the first African American appointed to be the SAIC of the Chicago Field Office, and one of only a handful of African American SAICs in the Service. As the SAIC of the Service's fifth largest field office, Grayson was in charge of 135 agents and Service employees. He was responsible for planning, directing and coordinating all law enforcement, protective, and administrative activities throughout the four-state area covered by the Chicago Field Office, including Illinois, Indiana, Iowa and Wisconsin. In his first evaluation as the SAIC of the Chicago Field Office in 1995, Grayson received an outstanding performance evaluation and a Senior Executive Service bonus award. Grayson continued to receive outstanding performance reviews throughout 1995 and 1996.

In January 1997, one of the two Assistant Special Agents in Charge (ASAIC) in the Chicago Field Office retired, thereby creating a vacancy. After reviewing a list of 15 agents eligible for the promotion based on their promotion scores, Grayson recommended that Isaiah

Mapp, an African American male, be promoted to the vacant Chicago ASAIC position. Despite Grayson's recommendation, Richard Griffin, the Deputy Director of the Secret Service, informed Grayson that he preferred Tom Frost or William Cotter, both white males, for the promotion. Ultimately Cotter was named to the position. Believing that the Service's decision to promote Cotter rather than Mapp was the product of race discrimination, Grayson informed his superiors of his concerns, though he never expressly mentions whom he contacted or the manner in which he relayed his concerns.[1]

In an unrelated event a few weeks after Cotter's promotion, Karen Whalen, a female Special Agent, complained that Grayson had sexually harassed her and given her "[i]nappropriate and inaccurate criticism in the presence of a non-supervisory employee." Bruce Bowen, the Service's Deputy Director of Investigations, spoke with Grayson via telephone regarding Whalen's complaint and, after completing his investigation, determined that relief was not warranted. But in early March, shortly after Whalen's initial complaint, she received a transfer to an undesirable detail in Gary, Indiana. On March 3, 1997, Whalen lodged a second complaint against Grayson, alleging that he had detailed her to an inconvenient office in retaliation for complaining about him. In response to Whalen's second complaint, Ralph Basham, the Service's Assistant Director of Administration and Grayson's immediate supervisor, authorized an investigation, also known

[1] Grayson's beliefs appear to be unfounded, as Mapp shortly thereafter received a promotion to the SAIC of the Atlanta, Georgia Field Office.

as a "fact finding." Basham assigned Senior Special Agent Karen Barry, a female SAIC from Tennessee, and Norbert Vint, the Executive Assistant to the Secret Service Director for Workforce Diversity, to investigate Whalen's complaint. Because Vint was the Director of the Workforce Diversity Office, Eljay Bowron, the Director of the Secret Service at the time in question, directed him to describe the purpose and function of his office to the Chicago agents by holding an open-office meeting during the timeframe for which he was in Chicago to investigate Whalen's complaint.

From March 24, 1997 to March 28, 1997, Barry and Vint conducted ten interviews during their fact-finding investigation into Whalen's complaint, including interviews of Whalen, her supervisors, her group leaders, and a peer. Barry and Vint also held an open meeting with the agents where Vint presented information regarding his office. After their investigation, Barry and Vint determined that Agent Whalen's second complaint should be dismissed. In the process of investigating Whalen's complaint, Barry and Vint uncovered a shocking pattern of improper behavior on the part of Grayson. In the few short days that Barry and Vint conducted their investigation, more than ten agents *independently* approached them desiring to voice complaints about Grayson. The complaints were less than innocuous and included allegations that: 1) Grayson received numerous gratuities and other favors for his personal use from private organizations; 2) Grayson retaliated against employees for speaking out against him or his policies; 3) Grayson sexually harassed and discriminated against female employees; 4) Grayson treated African American employees more favorably than

other employees; and 5) the Chicago Field Office had low employee morale.

Barry and Vint reported the allegations to Bowen, who instructed the Office of Inspection to conduct a Management Review of the Chicago Field Office. Upon Bowen's request, a Management Review team, comprised of 16 inspectors conducted a two-month long investigation of the Chicago Field Office commencing on April 3, 1997. During the management review, the inspectors received over 100 complaints about Grayson that corroborated the complaints uncovered by Barry and Vint. The inspectors received complaints from such diverse sources as: 1) employees in the Chicago Field Office, 2) the Chicago Police Department, 3) Chicago area businesses, and 4) former subordinates during Grayson's tenure in other Service offices.

The extent of Grayson's improprieties cannot be fully appreciated without a sampling of his numerous condemnable behaviors. Beginning with the least troubling allegations, the investigative team discovered that morale in the Chicago Field Office was abominably low. Out of 82 Service employees, 36 described their morale as low to non-existent, including but not limited to fourteen of the eighteen women in the office. The employees ascribed a constellation of reasons for the morale failure within the office, complaining that: 1) Grayson cared more about the office's arrest statistics than the working conditions; 2) Grayson did not effectively plan assignment and squad rotations; 3) Grayson favored African American agents and gave them preferable training courses and assignments; and 4) Grayson refused to accept managerial input and suggestions from his supervisory agents.

But Grayson did more than depress the morale of his employees. In addition, many employees believed that Grayson actively intimidated and harassed employees as well as retaliated against those who complained about his heavy-handed managerial style. For example, Special Agent John Orloff complained that when he sought to discuss his annual review with Grayson, the ASAIC informed him that: "[t]his is a quote from the boss [Grayson], 'tell Orloff I think he's doing an outstanding job, but if he chooses to come in and discuss his evaluation with me his points may go down.'" Similarly, Special Agent Peter Paradis stated that Grayson attempted to influence his testimony regarding Agent Whalen's discrimination claim by telling him that he knew who "butters his bread." More than a dozen other agents shared similar complaints, expressing the belief that Grayson intimidated his employees and created a culture in which the agents feared reprisals should they cross him.

Grayson's more appalling behavior concerned his negative attitude towards women and wanton and unchecked sexual harassment of female employees. Special Agent Mary Drury was a repeated target of Grayson's unwelcome sexual advances. He told her that her "legs seem to be just fine," commented on her clothing, and told her that "she should look around at the women who have been on this job for a long time . . . [because] they didn't look so good . . . [but that] maybe she was the exception to the rule." Numerous employees complained that Grayson repeatedly ogled and fondled female agents and other employees. His vulgar remarks to female agents include referring to himself as "big dick daddy from Cincinnati," commenting to female agents that if they had not had sexual intercourse with a black man that they were racists

and bigots, and advising them that if they tried "a black man sexually ... [they] would never want to be with anyone else." The investigation even revealed that Grayson had harassed an Assistant United States Attorney by repeatedly telephoning her at home to request dates.

The most serious allegations were that Grayson improperly, if not illegally, required his agents to solicit free services for his personal use from area businesses. Several area business and security personnel (including the director of operations for the United Center, the director of security for Harpo Studios, and the director of security for the Sheraton Hotels) commented upon Grayson's reputation in the community as an official who was always looking for something for free. Indeed, not only did Grayson solicit improper personal favors, but also required that his agents collect the perks squeezed from the local businesses. As with all of his other disturbing behaviors, Grayson offers no excuses or apologies for his seeking of personal favors from the public he protected – instead characterizing his solicitations as "small perks" and "insignificant."

Following the managerial review, Grayson not surprisingly received an "unsatisfactory" rating during his annual performance review for the July 1996-June 1997 review cycle. Moreover, because many of the complainants voiced a fear of retaliation, the Service also detailed Grayson to Washington, D.C., in August 1997, concluding that Grayson could not continue to manage the Chicago Field Office effectively and that he might retaliate against those who voiced complaints about him. While detailed to Washington, the Service provided Grayson with an office and a government car, as well as allowed for travel to Chicago to see his family. At all times, Grayson

maintained his same rank, grade and salary as he had as the SAIC in Chicago. After it transferred him, the Service informed Grayson that he would be disciplined, but offered him the opportunity to retire before any discipline was taken. Grayson chose the retirement route and he left the Service as of March 28, 1998.

Grayson alleged that the Service's actions were the product of race discrimination and filed multiple complaints with the Equal Employment Opportunity Commission (EEOC). In Grayson's first complaint, filed with the EEOC on June 3, 1997, he stated that the investigation triggered by Agent Whalen's complaints was in retaliation for Grayson's support of Isaiah Mapp, an African American male, rather than Tom Frost or William Cotter, white males, for promotion to a vacant ASAIC position. The EEOC denied this claim on June 27, 1997, and he appealed. The EEOC denied his appeal on August 28, 1998 and issued Grayson a right-to-sue letter, which his counsel received on August 31, 1998 and which Grayson himself received on September 8, 1998.

Grayson filed additional discrimination claims on December 3, 1997 and March 31, 1998, alleging that his detail to Washington, D.C., his unsatisfactory performance review, and the Service's request that he retire were due to race discrimination and retaliation for his June 3 claim. The EEOC denied these claims as well and issued a second right-to-sue letter on November 2, 1998.

On December 9, 1998, Grayson filed a complaint of employment discrimination and retaliation in the Northern District of Illinois. Grayson alleged that the Service discriminated and retaliated against him when it investigated him, removed him from the Chicago office and

assigned him to the Washington, D.C. office, gave him a poor performance review, and constructively discharged him by forcefully suggesting that he accept early retirement or face disciplinary proceedings. According to Grayson, a climate of racism permeated the Service and targeted minorities, including himself. Grayson further claimed that the Service's actions were in retaliation for his unsuccessful support of Mapp for promotion to the ASAIC position in Chicago.

In August 1999, the trial court granted partial summary judgment in favor of the Service. Grayson's attorney had received the right-to-sue letter on August 31, 1998, and Grayson had not filed suit until December 9, 1998, 101 days later – eleven days after the 90-day period for filing such claims had passed. *See* 42 U.S.C. § 2000e-5(f)(1). The trial court thus dismissed as time-barred Grayson's claims raised in his June 1997 EEOC complaint, including his claims that: 1) he was retaliated against in response to his support for Mapp; 2) he was retaliated against in response to his complaints of discrimination; and 3) he was retaliated against when the Service conducted the management review of Agent Whalen's complaints.

Discovery proceeded on Grayson's remaining claims and was extended a total of four times – three times at Grayson's request and once at the Service's request. In September 2000, the Service moved for summary judgment on Grayson's remaining claims, arguing that he had not established a prima facie case of discrimination and, even if he had, he could not demonstrate that the Service's reasons for its actions were pretextual. Grayson filed a Rule 56(f) motion to strike the motion for summary judgment or alternatively to allow him to reopen discovery to

uncover new evidence. According to Grayson, a "sinister, clandestine climate of racism" existed within the Secret Service. Grayson's theory was based on evidence of a 1990-1992 "Good Ol' Boy Round-up," involving unknown law enforcement participants in racist conduct in the southern United States. Grayson alleged that Service personnel who participated in the "roundups" were not disciplined, thus establishing that the Service gave more lenient treatment of similarly situated white employees. The trial court refused to allow Grayson to reopen discovery because the alleged evidence sought by Grayson was not new and had been available to him throughout the discovery period. The trial court later issued a thorough opinion granting summary judgment in favor of the Service on Grayson's race discrimination claim. In that opinion, the trial court proceeded directly to the pretext analysis and ruled that Grayson had failed to establish that the Service's reasons for its employment actions – mainly the overwhelming documentation that Grayson destroyed the morale of his subordinates through intimidation and harassment as well as improperly solicited personal favors throughout his tenure as the SAIC of the Chicago Field Office – were pretextual.

II. Issues

Grayson raises three issues on appeal. Initially, Grayson argues that the trial judge committed error in denying his Rule 56(f) motion. Second, Grayson contends that the trial judge erred in dismissing all of his retaliation claims as time-barred. Finally, Grayson contends that the trial judge erred in granting summary judgment in favor of the Service on his discrimination and constructive discharge claims.

III. Analysis

A. Grayson's Rule 56(f) Motion

Initially, Grayson complains on appeal that the trial judge committed error when she refused to allow him to re-depose his supervisors regarding any involvement they allegedly had with the "Good Ol' Boy Round-up."[2] Summary judgment should not be entered "until the party opposing the motion has had a fair opportunity to conduct such discovery as may be necessary to meet the factual basis for the motion." *Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Accordingly, Federal Rule of Civil Procedure 56(f) provides that where a "party opposing the [summary judgment] motion cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may . . . order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had. . . . " Fed R. Civ. P. 56(f).

A trial judge's decision to consider a defendant's motion for summary judgment before allowing the plaintiff to depose certain witnesses is a discovery matter, which we review under the abuse of discretion standard. *Woods v. City of Chicago,* 234 F.3d 979, 990 (7th Cir.2001); *Pfeil v.*

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[2] According to a March 1996 Department of Justice Report by the Office of the Inspector General entitled "Allegation of Racial and Criminal Misconduct at the Good Ol' Boy Roundup," some of the Roundup events involved highly racist conduct. Racist activities documented by the Report included "checking cars" of those entering the event to prevent African-Americans from attending, posting signs with racist messages including "no niggers" and "nigger checkpoint," and performing racist skits, including one in 1990 involving a "slave" in blackface performing oral sex on a "Klansman."

Rogers, 757 F.2d 850, 856 (7th Cir.1985). Under Rule 56(f), a party must file an affidavit stating the reasons why he cannot respond to a summary judgment movant's affidavits. *Kalis v. Colgate-Palmolive Co.,* 231 F.3d 1049, 1058 n. 5 (7th Cir.2000).

Grayson desired to re-open discovery, after it had been extended four times, in order that he might re-depose certain Service personnel regarding the "Good Ol' Boys Roundup." Grayson speculated that he might uncover evidence that other SAICs participated in the Roundups, but were not disciplined by the Service and thus that the Service discriminated against him by disciplining him for his improper conduct. Grayson's argument is without merit for two reasons.

First, as the trial court commented, evidence of the Roundups certainly was not "new knowledge" warranting the re-opening of discovery and Grayson offered no explanation for his failure to uncover the evidence of the Roundup until September 2000, long after discovery had concluded and when the defendant had a summary judgment motion pending before the trial court. Indeed the evidence in the record before us demonstrates that the Roundups were common knowledge long before Grayson brought this suit. In Grayson's brief to this court, he claims that the Roundups "unleashed a firestorm" on national television in 1995. Further, in 1996, the Office of the Inspector General released an extensive public report detailing the allegations regarding the Roundups. Grayson contends that his lack of diligence should be excused because the Service "concealed its knowledge of the Roundups" by failing to disclose a class action lawsuit containing allegations that the Service engaged in a pattern of discriminatory practices, including retaliation

against African American agents that spoke out against discrimination. *See Moore v. Summers,* 113 F.Supp.2d 5, 11 (D.D.C.2000). In that suit, several African American agents from the *Atlanta* office alleged that Service personnel had participated in the Roundups. But the Service had no obligation to disclose the *Moore* suit because Grayson never requested such information – his interrogatory specifically requested only that the Service identify "all charges of racial employment discrimination filed against the Secret Service with any federal, state or local agency *concerning conduct of individuals in the districts overseen by the Chicago Field office since 1993.*" (emphasis added). Where a party's own lack of diligence is to blame for that party's failure to secure discoverable information, it is not an abuse of discretion to deny a Rule 56(f) motion. *Id.; Farmer v. Brennan,* 81 F.3d 1444, 1449 (7th Cir.1996). In this case, Grayson had more than ample opportunity to discover and present evidence of the Roundups and the trial judge was well within her discretion to limit and refuse to prolong discovery for a fifth time so that Grayson could gather more evidence.

Grayson's Rule 56(f) motion was flawed for another reason: the evidence he sought is not relevant to his case. While evidence that Service personnel participated in the Roundups certainly could be characterized as an unsightly blemish upon the Service's reputation, it is not germane to the question of whether the Service launched a discriminatorily motivated investigation into Grayson's management of the Chicago Field Office. Evidence of generalized racism directed at others is not relevant unless it has some relationship with the employment decision in question. *Venters v. City of Delphi,* 123 F.3d 956, 973 (7th Cir.1997). Grayson points to no evidence to suggest that any of the

decision-makers in this case somehow participated in or condoned the Roundups, and thus cannot establish that evidence of the Roundups has any connection to his discrimination claims in this case.

Federal trial judges are called upon to manage notoriously crowded dockets. "Necessarily, they must have substantial discretion as they manage their dockets." *Reales v. Consolidated Rail Corp.*, 84 F.3d 993, 996 (7th Cir.1996). Without any evidentiary support, his request amounts to nothing more than a fishing expedition and we decline to rule that the trial judge abused her discretion in denying Grayson the opportunity to extend discovery a fifth time.

B. Grayson's Retaliation Claim

Grayson next argues that the trial judge erred in ruling that his retaliation claim was time-barred. The trial judge correctly observed that Grayson's attorney received the right-to-sue letter on these claims on August 31, 1998, and that Grayson failed to file his complaint until December 9, 1998, a period in excess of the statutorily proscribed 90-day filing period. 42 U.S.C. § 2000e-5(f)(1); *Threadgill v. Moore U.S.A., Inc.*, 269 F.3d 848, 849, 850 (7th Cir.2001) (90-day statute of limitations begins to run on the date claimant or attorney representing him received the letter). Accordingly, the trial judge's dismissal of Grayson's retaliation claim was proper.

Grayson seeks to breathe life into this claim by arguing for the first time on appeal that the Service retaliated against him not only because he protested the allegedly discriminatory treatment of Mapp, but also because he filed a discrimination claim with the EEOC on

June 3, 1997. But this retaliation claim appears nowhere in Grayson's complaint: Count I of his complaint alleges that the Service retaliated against him after he opposed "unlawful discrimination against Mapp and file[d] a charge with the EEOC on April 2, 1997." It is well-established that a party waives the right to argue an issue on appeal if he fails to raise that issue before the trial court. *Moulton v. Vigo County,* 150 F.3d 801, 803 (7th Cir.1998); *Stevens v. Umsted,* 131 F.3d 697, 705 (7th Cir.1997) ("It is axiomatic that arguments not raised below are waived on appeal."). Although it is true that Grayson argued in opposition to summary judgment that the Service retaliated against him for filing EEOC complaints, "a plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment." *Shanahan v. City of Chicago,* 82 F.3d 776, 781 (7th Cir.1996). Because Grayson failed to present to the trial judge any claim that the Service retaliated against him because of his June 3, 1997 EEOC complaint, we shall not consider the merits of that claim on appeal.

C. Grayson's Discrimination Claim

Finally, Grayson argues that the trial judge committed error by granting the Service summary judgment on his discrimination and constructive discharge claims. Grayson offered no direct evidence that the Service discriminated against him because of his race and so proceeded under the familiar burden-shifting test set forth initially in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under this test, Grayson was required to carry the burden of establishing a prima facie case of discrimination and demonstrate that: 1) he was a member of a protected class; 2) he was meeting

his employer's legitimate expectations; 3) he suffered an adverse employment action; and 4) other, similarly situated employees who were not members of the protected class were treated more favorably. *Paluck v. Gooding Rubber Co.,* 221 F.3d 1003, 1012 (7th Cir.2000). After Grayson establishes a prima facie case of racial discrimination, the burden of production shifts to the Service to demonstrate a legitimate, non-discriminatory reason for its employment action. *Id.* Once the Service has proffered a legitimate non-discriminatory reason for its employment action, the burden returns to Grayson to demonstrate that the Service's proffered reason was pretextual. *Id.* In order to establish pretext a plaintiff must demonstrate that an employer's proffered explanation for an employment decision is a dishonest explanation, rather than merely an error. *Kulumani v. Blue Cross Blue Shield Ass'n,* 224 F.3d 681, 685 (7th Cir.2000).

We have frequently warned litigants that the prima facie case must be established and not merely incanted. *Wells v. Unisource Worldwide, Inc.,* 289 F.3d 1001, 1006 (7th Cir.2002); *Coco v. Elmwood Care, Inc.,* 128 F.3d 1177, 1179 (7th Cir.1997). Given this admonition, it is interesting to note that nowhere in his brief does Grayson dispute the Service's claim that well over 100 agents in the Chicago Field Office lodged complaints with the management review team about Grayson's heavy-handed, morale-reducing, managerial style. Likewise, Grayson fails to dispute the Service's claim that it received numerous complaints about Grayson's solicitation of personal favors from those whom he was charged with the duty to protect. Given the magnitude and severity of the complaints, Grayson has failed to establish that he was meeting his employer's legitimate expectations. Although Grayson

attempts to argue that his prior record demonstrates that he was meeting the Service's legitimate expectations, the issue is simply whether he was meeting the Service's expectations at the time of the discharge. *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742, 745 (7th Cir.2002). Grayson also protests that the Service overreacted to the numerous complaints regarding his behavior. But a public official who solicits bribes and sexually harasses his subordinates cannot, by any stretch of the imagination, be considered to be meeting his employer's legitimate expectations.

We disagree with Grayson's contention that he can establish a prima facie case of race discrimination because the Service applied its employment expectations against him in a discriminatory manner. According to Grayson's theory, three white SAICs who had similar sexual harassment complaints lodged against them by a female subordinate were not subjected to an investigation into matters beyond the sexual harassment complaint. Thus, Grayson believes he was singled out for a racially discriminatory investigation and argues that the employee complaints and other evidence uncovered by the management review team are the fruits of a poisonous tree and cannot be used as the basis for an adverse employment action. When a plaintiff produces evidence sufficient to raise an inference that the employer applied its legitimate expectations in a disparate manner, the second and fourth prongs of *McDonnell Douglas* merge, allowing the plaintiff to establish a prima facie case by establishing that similarly situated employees were treated more favorably. *See, e.g., Peele v. Country Mutual Ins. Co.*, 288 F.3d 319, 329-30 (7th Cir.2002); *Curry v. Menard*, 270 F.3d 473, 478 (7th Cir.2001); *Johnson v. West*, 218 F.3d 725, 733 (7th

Cir.2000); *Flores v. Preferred Tech. Group,* 182 F.3d 512, 515 (7th Cir.1999).

To meet his burden of demonstrating that another employee is "similarly situated," a plaintiff must demonstrate that there is someone who is directly comparable to him in all material respects. *Patterson v. Avery Dennison Corp.,* 281 F.3d 676, 680 (7th Cir.2002); *Greer v. Board of Educ.,* 267 F.3d 723, 726 (7th Cir.2001); *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612, 618 (7th Cir.2000). In this inquiry, a "court must look at all relevant factors, the number of which depends on the context of the case." *Radue,* 219 F.3d at 617.

In his attempt to find other SAICs who were similarly situated, Grayson argues that three white male SAICs were accused of sexual harassment or depressing morale. According to Grayson, none of the three white SAICs was the subject of an extensive management review, which he believes demonstrates the Service treated him differently because of his race. Grayson's theory hinges upon his belief that if the Service had only investigated Special Agent Whalen's complaint via telephone, rather than by sending two fact-finders and conducting an open meeting in the Chicago Field Office, that none of his nefarious and inappropriate actions would have surfaced. Grayson's speculation is completely without merit. When the fact-finders came to Chicago, they were approached *independently* by several agents who sought to voice complaints about Grayson. No other SAIC, regardless of race, had been the subject of so many embarrassing and offensive complaints as Grayson, and Grayson identifies absolutely no evidence in the record to suggest that it was the way in which the fact finding was conducted, as opposed to his

own shameful conduct, that generated so many complaints.

In a last-ditch effort to preserve his appeal, Grayson reaches out to find a similarly situated employee by again raising the specter of the "Good Ol' Boy Round-up" as evidence that the Service condoned racism and singled out African American SAICs for discriminatory treatment. Grayson theorizes that an Assistant SAIC in another office may have at some time participated in the Roundups and that Director Bowron, who was the SAIC in Atlanta at the time when the Roundups were in their heyday, should have investigated and disciplined this unnamed Assistant SAIC. Grayson's speculation has no evidentiary support. Contrary to Grayson's claim that agents who participated in the Roundups were never disciplined or investigated, the record demonstrates that participation by Service agents in the Roundups was thoroughly investigated by the Department of Justice and Department of Treasury Inspector General's Office and Congress. Grayson presented not a shred of evidence to suggest that Director Bowron left any ASAIC who allegedly participated in the Roundups undisciplined.

Grayson has failed to point out any other SAIC who was the subject of more than 100 complaints ranging from depressing morale to sexual harassment to soliciting personal favors, and thus his attempt to locate a similarly situated employee is futile. Because pointing to a similarly situated employee who was treated more favorably is an essential element of his prima facie case, Grayson's discrimination and constructive discharge claims must fail.

Even if Grayson could establish a prima facie case, he could not raise a genuine issue of material fact as to

whether his transfer and detail (and eventually the request for resignation) were pretextual. "A pretext for discrimination means more than an unusual act; it means something worse than a business error; pretext means deceit used to cover one's tracks." *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 730 (7th Cir.2001) (internal quotations omitted). To demonstrate pretext, Grayson must demonstrate that the Service's articulated reason for its actions either: 1) had no basis in fact; 2) did not actually motivate its decision; or 3) was insufficient to motivate its decision. *Velasco v. Illinois Dept. of Human Serv.*, 246 F.3d 1010, 1017 (7th Cir.2001).

Grayson engages in mental gymnastics in an attempt to convince us that the Service did not honestly believe, based on the results of the investigation, that he was not suited to manage the Chicago Field Office. For instance, he quibbles that the Service's assessment of his office's morale was erroneous because only 36 of 82 employees complained of low morale, meaning that 56 did not. He also suggests that several agents stated that they were not intimidated by him, and thus the Service's assessment was erroneous. Lastly, Grayson characterizes his solicitation of personal favors as a "petty reason." But in determining whether an employer's proffered reason for an employment action was pretextual, we are not concerned with the correctness or desirability of reasons offered for employment decisions, but rather the issue of whether the employer honestly believes in the reasons it offers. *Wade v. Lerner New York, Inc.*, 243 F.3d 319, 323 (7th Cir.2001). As we often comment, "the federal anti-discrimination laws do not authorize judges to sit as a kind of 'super-personnel department' weighing the prudence of employment decisions," and Grayson's self-serving quarrels with the

legitimacy of the Service's investigation cannot establish pretext. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1139 (7th Cir.1997). Grayson fails to direct us to anywhere in the record to suggest that the Service did not honestly believe, based on more than 100 complaints from employees, former employees, and citizens of the community Grayson protected, that Grayson engaged in behavior that warranted removing him from his position as the SAIC of the Chicago Field Office.

IV. Conclusion

Grayson engaged in a pattern of behavior that was inappropriate, not to mention deplorable, for a Special Agent in charge of a large field office. Well over 100 complaints were lodged against him detailing his behavior, for which he offers no excuses. In this appeal, Grayson again shamelessly refuses to accept responsibility for his own misguided activity and instead points the finger at those who investigated him. As he has failed to present sufficient evidence to demonstrate that he was meeting his employer's legitimate expectations, we AFFIRM the decision of the trial court.

150 F.Supp.2d 979

United States District Court,
N.D. Illinois,
Eastern Division.

Ralph L. GRAYSON, Plaintiff,

v.

Paul O'NEIL, Secretary of Treasury, Defendant.

No. 98 C 7907.

Aug. 2, 2001.

Dennis P.W. Johnson, Walter Jones, Jr., Stephen H. Pugh, Camille B. Conway, Pugh, Jones & Johnson, P.C., Chicago, IL, for Plaintiff.

Kurt N. Lindland, Joseph M. Ferguson, United States Attorney's Office, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

BUCKLO, District Judge.

From 1993 to 1997, Ralph Grayson, an African American man, was Special Agent in Charge ("SAIC") of the Chicago Field Office of the United States Secret Service. In July 1997, he was removed from that position after an investigation into complaints made by Special Agents who worked or had worked under him. Grayson was reassigned to Washington, D.C., and retired from the Secret Service in the Spring of 1998. After timely filing charges with the EEOC, he received his right to sue letter, and sued under Title VII, 42 U.S.C. § 2000e-5, alleging retaliation (count I) and intentional racial discrimination (count II), and constructive discharge (count III). I dismissed the retaliation claim as time barred in a minute order of August 6, 1999. The Secret Service moves for summary judgment on

all remaining counts, and I grant the motion. I also decide several other motions.

I.

Grayson joined the Secret Service in 1974, and served in many responsible positions, including SAIC Columbus, Ohio (1986-88), SAIC Birmingham, Alabama (1998-90), and SAIC Forgery Division, Washington, D.C. (1991-1993). He took over as SAIC in Chicago in 1993, supervising over 100 personnel in one of the Secret Services' largest offices. Under his administration the Chicago field office was recognized for its arrest record in fighting counterfeiting and fraud in the telecommunications industry. Through 1996, he received outstanding individual performance evaluations, as well as bonuses and various awards from federal and municipal authorities.

Despite this, Grayson claims, he lost his position and was ultimately forced to retire because of race. The Secret Service demurs, attributing the end of Grayson's Secret Service career to his own unsatisfactory performance. Grayson offers evidence of racist misconduct in the Secret Service, including evidence of the "Good Ol' Boy Round-ups," annual events occasionally featuring grossly racist signs, t-shirts, skits, and so forth in which, he says, Secret Service and other federal agents participated from 1980 to 1995. Grayson says that he challenged the "good old boy" network, offering support and encouragement to minority Secret Service employees. In March 1997, Grayson recommended that another African American agent, Isaiah Mapp, be promoted to be Assistant SAIC ("ASAIC"), the number two position in the office. Mapp was passed over in favor of a white agent. According to Grayson, it was this

recommendation that triggered the events leading to this lawsuit.

The Secret Service has a different account. In February 1997, a woman Special Agent complained that Grayson had criticized her in front of others. After an initial investigation, which determined that she was not entitled to relief, she amended the grievance in March 1997, claiming that Grayson had retaliated against her for complaining by assigning her to another task force at an inconvenient office. The amended complaint was investigated by fact finders, and then by special investigators from the Secret Service's Office of Internal Investigations, who conducted an extensive inquiry. This uncovered a flood of complaints about Grayson's performance from his subordinates.

In April 1997, the investigators submitted a Management Review Report that found that: (1) Employee morale in the Chicago Field Office was low in part because Grayson focused on arrest statistics while ignoring his subordinates' exhaustion. (2) There were reports of mismanagement, including complaints that Grayson intimidated and threatened retaliation against his employees, *e.g.*, threatening to lower an agent's performance review for asking to discuss it. (3) There were reports of a pattern of "sexual harassment," including alleged obnoxious sexual references, but no reported instances of attempted sexual coercion; and allegations that he disliked women agents. (4) There were reports from interviewees of racial bias towards minorities, *e.g.*, that Grayson replaced a white with an African American agent during a visit by a foreign dignitary, and gave African Americans more training and other opportunities than whites. (5) Finally, the report contained statements from Secret Service Agents and

outside providers that Grayson required his agents to solicit free services and other perks for his personal use, such as health club passes, hotel rooms, a meeting with Oprah Winfrey for his wife and friends, special parking places at Chicago Bulls games, and so was "known as a joke" in local law enforcement because he was always looking for something free.

In July 1997, Grayson received an "unsatisfactory" rating in his annual performance review, which referred to the findings in the Management Review Report. In August 1997, he was transferred to Washington, D.C., on a temporary basis. Ultimately, the Secret Service prepared to discipline Grayson, but offered him the opportunity to retire before charges were filed. He retired early in March 1994.

II.

A.

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 329, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Fed.R.Civ.P. 56(c). The party opposing the motion must come forward with evidence such that "a reasonable jury could return a verdict for [him]." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). I construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. *Hot Wax, Inc. v. Turtle Wax,* Inc., 191 F.3d 813, 818 (7th Cir.1999).

A plaintiff may meet his burden of proof under Title VII by offering either direct proof of discriminatory intent

or by proving disparate treatment through the indirect, burden-shifting method outlined in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343, 347 (7th Cir.1997). For a prima facie "indirect" *McDonnell Douglas* case, Grayson must demonstrate that (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) his employer treated similarly-situated employees outside of his protected class more favorably. *Stockett v. Muncie, Ind., Transit Sys.,* 221 F.3d 997, 1001 (7th Cir.2000). If the employee does not have an exemplary employment record, he must show that "although he was not a good employee, equally bad employees were treated more leniently by [the employer] if they happened not to be black." *Bush v. Commonwealth Edison Co.,* 990 F.2d 928, 931 (7th Cir.1993). The Secret Service may produce evidence of "a legitimate and nondiscriminatory reason for the employment decision," *Robin v. Espo Eng'g Corp.,* 200 F.3d 1081, 1088 (7th Cir.2000), which the plaintiff must rebut with evidence that the Secret Service's stated reason is merely a pretext. *Jackson v. E.J. Brach Corp.,* 176 F.3d 971, 983 (7th Cir.1999). A factfinder's rejection of the Secret Service's nondiscriminatory reason may itself be enough to find for the plaintiff on the issue of liability. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). However, when an employer articulates a lawful reason for discharging the plaintiff, "it is not [my] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *Giannopoulos v. Brach & Brock Confections Inc.,* 109 F.3d 406, 410 (7th Cir.1997).

B.

The basic issue here is whether Grayson was treated worse than other employees who were equally bad and who were not African American, which is also his case for pretext. As an African American, Mr. Grayson is in a protected class. The Secret Service does not dispute that Grayson was subject to adverse action, and being demoted from a responsible position and transferred to what I must here assume is a makework job 800 miles away is clearly adverse action. I deal with Grayson's job performance under the pretext inquiry. *See Adreani v. First Colonial Bankshares Corp.,* 154 F.3d 389, 394 (7th Cir.1998) (citing cases authorizing this).

The Secret Service argues that Grayson was not treated worse that [sic] similarly situated whites because there was no one else who had been accused of such a wide-ranging collection of misdeeds. Grayson responds that several white agents were suspected of far worse misbehavior than he was charged with in the incident that triggered the initial inquiry, but were subject to investigations that were far more limited in scope, and given far more trivial discipline. Therefore, he says, he was treated worse than similarly situated whites, and a jury could conclude that the Management Review Report was just a pretext for firing him because of race.

1.

I begin with the Secret Service's appraisal of Grayson's conduct. The defendant says that it stripped Grayson of his job as SAIC in Chicago, sent him to Washington, and offered him the alternatives of retiring or facing disciplinary charges, because it believed the allegations in the

Management Review Report, including allegations (to recap briefly) of: (1) low employee morale due to concentration on arrests, (2) mismanagement, intimidation, and threats of retaliation; (3) a pattern of sexual harassment, (4) racial bias in favor of minorities; and (5) solicitation of free services and other perks for personal use, to the point of being known as a "joke" in Chicago law enforcement. The report, which is very extensive, includes scores of complaints by many different employees in the Chicago office.

Grayson objects that the report is hearsay, but that is not to the point. It may be admissible for another purpose, such as to show the information available to the decision-makers in the case. "Because a Title VII claim requires intentional discrimination, the ... inquiry focuses on whether the employer's stated reason was honest, not whether it was accurate." *Helland v. South Bend Comm. Sch. Corp.,* 93 F.3d 327, 330 (7th Cir.1996) (pretext context). I consider not whether the charges are true, but only whether Grayson could persuade a rational jury that the "the defendant did not honestly believe" its stated reasons for the challenged decision. *Crim v. Board of Ed. of Cairo Sch. Dist. No. 1,* 147 F.3d 535, 541 (7th Cir.1998).

Any substantial single subset of the five classes of charges against Grayson would be enough reason, if honestly believed, for the Secret Service to remove him from his position. Therefore, to conclude that the Secret Service did not really believe the charges, I would have to determine that the whole report was a frameup. Construing all facts in the best light for Grayson and drawing all reasonable inferences in his favor, I find only two areas where a jury might reasonably doubt the Secret Service's honest belief in the allegations. That is not enough.

The "sexual harassment" charges were, on the evidence of the report, "the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers," *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir.1995), that the Seventh Circuit has stated is not actionable. *Id.* Of course, misbehavior need not be actionable at law for it to be a basis for discipline at work. But under the summary judgment standard, I must read Grayson's alleged conduct in as innocent a light as possible, and so interpreted, a rational jury might conclude that, if these particular sexual harassment charges were all the Secret Service had, its professed reason was pretextual. Likewise, read in the light most favorable to Grayson, the allegations that he showed favoritism towards African Americans are hard to credit, particularly when the Secret Service itself is committed to goals of diversity. But this is not all the basis that the Secret Service had.

The Management Review Report also contains charges where such doubts would not arise, at least [sic] far as Grayson has shown. First, it involves much evidence that morale in Grayson's office was low because of a single-minded concentration on arrests. Grayson argues that he had been recently given awards and bonuses for that very arrest record. This is nonresponsive. The arrest record was good, but the Secret Service still might well believe that the conditions he imposed on the office to attain this good record were very troubling. Second, there is also the category of complaints about mismanagement, intimidation, and retaliation. Grayson denies that there is anything to this, but the complaints about these problems were not so manifestly incredible that a rational jury could not conclude that the Secret Service believed them. Third and finally there are the charges that Grayson was a

cheapskate on the prowl for free perks, who would often send agents out to nab freebies to which he was not entitled, and whom the law enforcement community regarded as a "joke" for this reason. Grayson responds that he was a recipient of local recognition from the City of Chicago, as well as of outstanding performance evaluations, and had been recently recommended by his superiors for a Meritorious Presidential Rank Award. These evaluations and recommendations, however, antedated the investigation. Grayson was well regarded by his superiors until they were apprised of a large number of complaints about his performance. They are not barred from subsequently removing him for misbehavior merely because they had earlier given him awards and recommendations before they had heard and come to believe complaints such as those discussed here.

2.

The Secret Service had evidence from which it could have come to the belief that Grayson was not a good employee, but the law "protect[s] average and even below-average workers against being treated more harshly than would be the case if they were of a different race." *Riordan v. Kempiners,* 831 F.2d 690, 697-98 (7th Cir.1987). If the Secret Service treated equally deficient white employees who were similarly situated better than Grayson, he has a case. One sort of evidence concerns several white SAICs who were investigated for misconduct, but disciplined less seriously than Grayson. The second set concerns officials who were not disciplined at all in connection with the Good Ol' Boy Roundups. I deal with these in turn.

SAIC # 1[1] was accused of sexual harassment for warning a subordinate about a personal relationship, including statements such as "[I]t's hard to think rationally when you are on your back with your legs in the air." Grayson introduces evidence that there was no investigation of the matter beyond questioning SAIC # 1, and no discipline was imposed on him. SAIC # 2 approved a bridal shower to be held at work including a male stripper as entertainment. After an investigation, it was recommended that he be suspended without pay for 15 days. SAIC # 2 had previously been suspended without pay for criticizing a subordinate, a woman Special Agent for marrying another agent. A third SAIC, # 3, was investigated after serious charges were made that he abused his children, pointed his weapon at an employee, and exposed himself. Eljay Bowron, then Assistant Director of the Secret Service, and subsequently Director during the events at issue here, investigated at the SAIC's field office. He found no support for the most serious charges, but discovered complaints of mismanagement and communications. SAIC # 3 was threatened with removal if the problems were not rectified, but he was not removed. Bowron testified that "not long after that," SAIC # 3 retired.

Grayson argues that a jury might reasonably regard the Management Team's investigation and its results as a suspiciously disproportionate response to a fairly insignificant initial complaint, especially in view of evidence he

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[1] The names of these agents are redacted under a protective order. The parties refer to the individual I call "SAIC No. 3" by the name of the city where he worked. In the interests of confidentiality, I refer to him, as to the others, only by number.

has brought forward of less rigorous investigation of misconduct by the white SAICs # 1-3. However, even supposing so, it would not follow that the Secret Service did not honestly believe its results. And Grayson has not come forward with evidence that the investigation was improperly motivated. The initial complaint that Grayson had inappropriately criticized a woman in front of others was found to be without merit after a cursory investigation less rigorous than those involved in the cases of the three SAICs; an amended complaint charging retaliation was investigated by the team of special investigators, which turned up the large amount of evidence set forth in their report of problems with Grayson's performance on other matters. It was not improper to investigate the further complaints that came to light when the investigators looked into the amended initial complaint. Grayson does not argue that the Secret Service fabricated the complaints out of whole cloth.

The investigations of the alleged misconduct in the case of the three SAICs are disanalogous, and indeed these are not similarly situated employees who were treated better than Grayson. With SAICs # 1 and # 2, the investigations of their charges did not turn up any new complaints outside those originally being investigated, whereas the investigation of Grayson did. Additionally, the allegations that were investigated with SAICS # 1 and # 2 were much less serious than those for which Grayson was ultimately removed from his position. SAIC # 1 was not disciplined for sexual harassment, but his remarks, though offensive, were no worse than Grayson's own vulgar banter, which I have said would probably not be a basis for summary judgment against him if it were all the

Secret Service had. SAIC # 2 was indeed suspended without pay for condoning a single incident, allowing a male stripper at an office party, which is not comparable to the range and diversity of the misconduct Grayson is accused of, even when I have discounted the complaints that a rational jury could reject on the evidence Grayson has produced.

SAIC # 3 is a better candidate for a similarly situated employee, although he too falls short. With him, an investigation into very serious charged misconduct – child abuse, indecent exposure, pointing guns at subordinates – was carried out by then-Assistant Director of the Secret Service Eljay Bowron, who found the most serious charges to be groundless;[2] but his informal inquiries uncovered collateral complaints of mismanagement and communications problems. SAIC # 3 was threatened with removal, but he retired before any action could be taken against him. Being removed is adverse action, so Grayson could argue that he was treated more poorly; and there is no evidence to support the Secret Service's claim that SAIC # 3 was given Grayson's choice: that is, to quit or face disciplinary proceedings. However, the allegations about Grayson's performance were worse than those about SAIC # 3's, including not only poor morale, miscommunications,

[2] The entire evidence in the record of the matter with SAIC # 3 is Bowron's deposition testimony. Grayson requested the records for his field office, but the government affirms that there are no records pertaining to Bowron's investigation of the matter, and that no investigative files were created. Grayson admits that he did not specifically request a deposition of SAIC # 3, although he would have been entitled to take one had he desired to do so.

and mismanagement, as with SAIC # 3, but also embarrassing freeloading as well as intimidation and retaliation. Therefore. SAIC # 3 was not in fact similarly situated. *See Bush,* 990 F.2d at 931 (less-than-exemplary employee must show that "equally bad" employees were treated more leniently).

Grayson urges that he was treated worse than SAIC # 3 because he was the subject of a Management Review, while SAIC # 3 was not. However, there is no reason to think that, in the circumstances, the different form of the investigation was a relevant difference or worse treatment. *See O'Hara v. Illinois Dep't of Mental Health,* 120 F.Supp.2d 704, 708 (N.D.Ill.2000) (Investigations of African-American employee in connection with sexual assault and anonymous death threat were not "adverse employment actions."). As I said in *O'Hara,* the discrimination laws should not be interpreted to discourage employers from conducting proper and desirable inquiries. *Id.* Investigating an employee merely to harass him because of his race would be illegal, but harassment is not alleged here, and an employer need not institute a full-scale Management Review in every case, whether or not the facts call for it, to avoid a discrimination lawsuit.

3.

As part of his evidence, Grayson also offers (1) the refusal to promote Isaiah Mapp, an African American; (2) affidavits from minority Secret Service agents in *Moore, et al. v. Summers,* No. 00-953 (D.D.C.), filed Aug. 15, 2000, reporting widespread discrimination, experienced and observed by others, and (3) the Department of Justice's own March 1996 Report by the Office of the Inspector

General on "Allegation of Racial and Criminal Misconduct at the Good Ol' Boy Roundup" (the "OIG Report"). Evidence of generalized racism or even discrimination directed at others is not germane unless it has "some relationship with the employment decision in question." *Venters v. City of Delphi,* 123 F.3d 956, 973 (7th Cir.1997). The evidence must "reflect a propensity by the decisionmaker to evaluate employees based on illegal criteria." *Id.* The Secret Service's choice of a white agent over Mapp does not itself show racism, and the affidavits in *Moore* are not tied to this employment decision in any clear way. But the OIG report is troubling. I became concerned that the record might include evidence that Eljay Bowron, Secret Service Director and the main relevant decisionmaker in this affair, condoned or failed to punish subordinates for participating in intolerable racist misconduct at the Roundups. Whether I analyze this as direct evidence of discrimination or indirect evidence of dissimilar treatment of similarly situated individuals, if Grayson had evidence of such lenience, that might provide sufficient basis for denial of summary judgment. I ordered supplemental briefing on the matter, and now conclude that the evidence in the record does not support the concern about Bowron.

The Roundups were annual events attended by law enforcement personnel from 1980 through 1996 or so. Some of these Roundups involved shockingly racist conduct, particularly in 1990-1992, during which years, the OIG Report found, *e.g.,* that in 1990, a "Nigger Checkpoint" sign with a circle/slash around a black persons's head was posted; that people approached cars and asked whether there were "niggers inside," and there was a racist skit involving a "slave" in blackface performing oral sex on a "Klansman." In 1992, a subsequent Roundup

President posed with a Confederate flag making obscene and inappropriate gestures. There were signs posted at the campsite saying "no niggers" and "nigger checkpoint." That year a policeman participant performed a skit involving smashing open a watermelon and pulling out a black painted doll, saying that one had to "kill the seed while it was young." Racist t-shirts were offered for sale in 1991, 1992, and 1995. Secret Service agents was [sic] elected "President" of the 1985 and 1989 and 1990 Roundups.

So far this reflects an appalling atmosphere of racism in certain subterranean (and, one hopes, sparsely inhabited) reaches of the law enforcement community, but not racism connected with the decisionmaker or the decision here. However, Grayson argues the worst incidents of racism occurred at the Roundups while Eljay Bowron was SAIC Atlanta, Georgia, in 1989-92, and that Buster Williams, a supervisory agent [sic] the Atlanta Field Office under Bowron, was an organizer of the Roundups during that period, and was not punished. If true, that might show a decisionmaker's propensity to act from forbidden motives, as well as more lenient treatment of similarly situated whites. Grayson offers the affidavit of Jenell Walker-Clark, then a Secret Service Special Agent in Atlanta. She states that Williams was ASAIC there from 1994 to 1996, and that he "took part in organizing and promoting" the Roundup during 1994-96, and was not disciplined for it.

The problem is that, according to the OIG Report, the really appalling conduct at the Roundups occurred in 1991-92, not after 1994. The only evidence for the period when evidence places Williams in Atlanta is that in 1995 someone unknown, perhaps not even a law enforcement official, offered racist t-shirts for sale at a Roundup. I can't

attribute that to Bowron or Williams. Grayson then argues that "it can reasonably be inferred" that Williams was in the Atlanta Field Office from 1989 to 1996. He refers again to Walker-Clark's testimony, but she herself arrived in Atlanta only in 1994, and she says nothing about where Williams was or what he had done before then. Grayson also refers me to the affidavit of Cheryl Tyler, a Secret Service Investigator who states that unnamed Secret Service agents participated in racist activities at various Roundups. Tyler does not say where she was located, but her supervisor was ASAIC Lee Wagner, not Buster Williams. I draw every reasonable inference in Grayson's favor, but no rational jury could conclude from these two pieces of evidence that Williams was even in Atlanta in 1991-92, much less that he participated in organizing racist excesses in 1990-92 with the condonation [sic] or toleration of Eljay Bowron.

I conclude, therefore, that Grayson has not carried his summary judgment burden by showing that he was treated worse than similarly situated white employees, or that there is any direct or circumstantial evidence that his removal and transfer were because of his race rather than because of the Secret Service's honest belief in the credible portions of the Management Report about his deficient performance. There is no evidence of pretext. Grayson was legitimately removed from the position of SAIC Chicago.

C.

Grayson argues that he was constructively discharged by being threatened with disciplinary proceedings if he did not resign or retire. Constructive discharge "is a judicially-created response to the fact that Title VII, as originally

enacted, afforded no damages remedy to a harassment victim for emotional trauma or even for medical expenses [he] may have incurred." *Chambers v. American Trans Air, Inc.,* 17 F.3d 998, 1005 (7th Cir.1994). "Thus, courts have said that where conditions are so intolerable that a reasonable person would feel compelled to resign, a plaintiff may do that, and then sue." *Id.* For constructive discharge, Grayson must show that (1) the Secret Service made his workplace intolerable, *Drake v. Minnesota Mining & Mfg.,* 134 F.3d 878, 886 (7th Cir.1998), and (2) "the underlying working conditions were themselves unlawful (*i.e.,* discriminatory in some fashion)." *Sweeney v. West,* 149 F.3d 550, 557-58 (7th Cir.1998). More than ordinary discrimination is necessary to establish a constructive discharge claim; in the ordinary case, an employee is expected to remain employed while seeking redress. *Perry v. Harris Chernin, Inc.,* 126 F.3d 1010, 1015 (7th Cir.1997). Grayson's situation was certainly uncomfortable. But the intolerability must be because of the illegal discrimination. *Drake,* 134 F.3d at 887. Grayson's constructive discharge case thus depends on his theory that the investigation and disciplinary process were a racist frameup. He has not met his burden of producing evidence that would persuade a rational trier of fact of this claim, so his constructive discharge claim fails.

III.

I GRANT the Secret Service's motion (1) for summary judgment on counts II and III. I DENY Grayson's motions (1) to strike the Secret Service's statement of facts, and (2) to deem certain facts admitted.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 20, 2002

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Hon. ANN CLAIRE WILLIAMS, Circuit Judge

No. 01-3160

RALPH L. GRAYSON, *Plaintiff-Appellant,* *v.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
PAUL O'NEILL, *Defendant-Appellee.*	No. 98-C-7907 Elaine E. Bucklo, *Judge.*

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* in the above-entitled cause filed by the plaintiff-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.